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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/745,192	12/21/2000	Rudolph W. Frey	24430.6	7610
9355	7590	10/08/2004	EXAMINER	
ALLEN, DYER, DOPPELT, MILBRATH & GILCHRIST, PA P.O. BOX 3791 ORLANDO, FL 32802-3791				SHAY, DAVID M
ART UNIT		PAPER NUMBER		
3739				

DATE MAILED: 10/08/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/745,192	FREY ET AL.
	Examiner david shay	Art Unit 3739

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) Responsive to communication(s) filed on 29 April 2004.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) Claim(s) 1-85 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-85 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____.
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
	6) <input type="checkbox"/> Other: _____.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-28 and 85 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hohla in combination with Charman. Hohla teaches a method such as claimed except for the precise corrections and the means for determining the tissue to be removed. Charman teaches using wave front aberrations to correct vision. It would have been obvious to the artisan of ordinary skill to employ the method of Charman to determine the tissue to be removed in the method of Hohla, since Hohla teaches no particular method to do this or to employ the refractive correction method of Hohla in the method of Charman, since Charman discusses no particular refractive surgical procedure, and is either case to provide the particular surgical outcomes, since these are notorious in the art, official notice of which has already been taken, thus producing a method such as claimed.

Claims 29-56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Munnerlyn in combination with Charman. Munnerlyn teaches a method as claimed except for the precise corrections the means for determining. The teachings of Charman; the motivations for combination thereof; and the official notification are as set forth above. Thus it would have been obvious to the artisan of ordinary skill to combines these old and well known teachings to produce a method such as claimed.

Claims 58-84 are rejected under 35 U.S.C. 103(a) as being unpatentable over Warner et al in combination with Charman. Warner et al teach a method such as claimed except for the precise corrections and the means for determining. The teachings of Charman; motivations for combination thereof; and the official notification are all as set forth above. This is would have

been obvious to the artisan of ordinary skill to combine these old and well known teachings to produce a method such as claimed.

Applicant argues that Hohla does not teach a method such as claimed with the exception of the precise corrections and the means for determining the tissue to be removed. However, as the examiner understands it, the means by which applicant determines the tissue which is to be removed is the determining of the path difference between the plane wave and the returning wavefront. If this is in fact not what applicant does via the path difference determining, the examiner respectfully requests applicant's indulgence and an explanation of what the determining step is used for and also what other steps which in no way involve the path difference determination or data therefrom and used to determine the tissue to be removed, along with supporting citations of the specification as originally filed. However, since it appears from the examiner's reading of the originally filed specification (see e.g. page 6, lines 15-26 of the originally filed specification), that this is the means by which the tissue to be removed is determined, the examiner stands by his description of Hohla, Munnerlyn and Warner as wholly accurate.

Applicants subsequent assertion, that since "Hohla does not teach or suggest the combination claimed by Applicants there is no motivation to combine Hohla with any other art." The examiner respectfully submits that applicant's assertion which appear to argue that since Hohla is not applicable under 35 U.S.C. 102 it cannot be applied under 35 U.S. C. 103 is not accurate, and thus not convincing.

Lastly, the express statement in Charman that monitoring aberrations on a routine basis before and after optical correction may provide guidelines by which changes can be made in

refractive surgical procedures (Charman pages 574, column 2) clearly covers applicant's broadly cast claim language "applying said plurality of laser beam shots to the eye in a manner that is based in part of the optical path difference..."

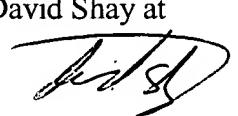
In summary the examiner has accurately described the reference teaching and combined them in a permissible way, using only the teachings of the prior art to provide the motivation for combination. These arguments are equally applicable to the combinations involving Munnerlyn and Warner et al

Applicant's arguments filed April 30, 2004 have been fully considered but they are not persuasive. The arguments are not convincing for the reason set forth above.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication should be directed to David Shay at telephone number 308-2215.



DAVID M. SHAY  
PRIMARY EXAMINER  
GROUP 330